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No. 99-138

Supreme Court, U.S.
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In The

Supreme Court of the United States

JENNIFER TROXEL, et vir,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF THE INSTITUTE FOR JUSTICE, ALABAMA FAMILY ALLIANCE, AND THE MINNESOTA FAMILY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The Institute for Justice is a nonprofit, public interest legal center committed to defending the essential foundations of a free society and securing greater protection for individual liberty. The Institute has a particular interest in securing the natural rights and liberties of citizens, including the right of parents to direct the upbringing and education of their children. Among the issues we have litigated in this area are parental school choice and mandatory community service as a condition of public high school graduation.

The Alabama Family Alliance, incorporated in 1989, is the largest independent nonprofit research and education organization in Alabama focusing on state and national public policy issues affecting the family. The Alabama Family Alliance is dedicated to defending and promoting the ideals of free markets, limited government, and strong families that are indispensable to the preservation of a free and prosperous society. The mission of the Alliance is to enter the public square of policy development with innovative ideas and fact-based, objective analysis of issues in the areas of the family, economics, education, health care, the environment, government, and the culture.

The Minnesota Family Institute is a nonprofit, education research organization that promotes policies and initiatives that strengthen families. The Institute seeks to

help families by strengthening marriages and promoting parental rights and religious liberties throughout society.[1]

BRIEF SUMMARY OF THE FACTS

A Washington State statute, RCW 26.10.160(3), allows any person, at any time, to petition for visitation rights with children without regard to the relationship to the child, without regard to changed circumstances, and without regard to harm. Visitation rights are to be granted, pursuant to the statute, if it is in the "best interests" of the child. *In re Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21 (Wash. 1998).

The Supreme Court of Washington reviewed this statute in the petitions of several different parties. Only one case is currently before this Court. It involves a petition filed by grandparents to obtain visitation rights. The facts are tragic. (The factual summary below is drawn from the majority opinion in *Custody of Smith*.)

Natalie and Isabelle Troxel are the daughters of Brad Troxel and Tommie Granville, who never married. After their separation, Brad lived with his parents, Jennifer and Gary Troxel, and the girls visited their father at their grandparents' home on occasion. Brad committed suicide

[1] In conformity with Supreme Court Rule 37, the *amici* have obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. The *amici* also state that counsel for a party did not author this brief in whole or in part; and no person or entities other than *amici*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

in May 1993. At first, the girls continued to visit the Troxels regularly, but their mother decided to limit visitation. In December 1993, the Troxels filed a petition pursuant to the above-referenced statutory provision to obtain visitation rights with their grandchildren. In 1995, the trial court entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on each of the Troxels' birthdays. Granville (the mother) appealed, during which time she married again. Her husband adopted the girls in February 1996.

The Washington Court of Appeals subsequently reversed the visitation order and dismissed the grandparents' petition holding that nonparents lack standing to seek visitation unless a custody action is pending. The Supreme Court of Washington, looking to the plain meaning of the statute, held that the grandparents had standing. The statute clearly stated that "any person" could petition for visitation. Nevertheless, the court held that the statute violated the fundamental right of parents under the Fourteenth Amendment to direct the upbringing and education of their children.

In striking down the law, the Supreme Court of Washington held that U.S. Supreme Court precedents demanded that some harm must threaten the child before the government may constitutionally interfere with a parent's right to rear his or her own child. The court went on to note that the requirement of harm is the sole protection that parents have against pervasive state interference in parenting. The court further noted that there could be certain circumstances, such as when a child has enjoyed a substantial relationship with a third person, where

depriving the child of contact could cause severe harm. But the state statute at issue had no such requirement. Any person could petition for visitation rights, even absent a substantial relationship, and a court is empowered to grant visitation not under a harm standard, but under a "best interests of the child" standard. As the court held, "short of preventing harm to the child, the standard of 'best interests of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental right." *Custody of Smith*, 969 P.2d at 30.

This Court granted certiorari to review the question of whether Washington's statute violates the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The old maxim "Hard cases make bad law" holds with special force in this case. One can hardly avoid sympathizing with grandparents who are deprived of contact with their grandchildren. The focus must remain, however, on the challenged Washington State statute in this case and what it sanctions. Indeed, in this case, the *parent* is the victim of the State's overly sweeping intrusion into the sanctity of the family.

The statute occasions a wholesale transfer of power from parents to courts, allowing them to determine the most intimate of relationships – contact with children – on the basis of subjective criteria. The statute places the State in a position superior to the parents in determining a child's best interests. Our Constitution and this Court's

precedents protect the family from unwarranted governmental intrusion. Petitioners call upon this Court to repudiate jurisprudence that forms an essential cornerstone of our free society: the fundamental right of parents to direct the upbringing and education of their children. We call upon the Court to reaffirm and strengthen it.

ARGUMENT

I. SINCE *MEYER* AND *PIERCE* WERE DECIDED BEFORE THE MODERN TWO-TIER APPROACH TO ANALYZING CONSTITUTIONAL RIGHTS, THIS COURT SHOULD REAFFIRM PARENTAL LIBERTY AS A FUNDAMENTAL CONSTITUTIONAL RIGHT UNDER THE FOURTEENTH AMENDMENT.

The right of parents to direct and control the upbringing and education of their children – the right to "parental liberty" – is firmly established in our constitutional heritage and guaranteed by the Fourteenth Amendment to the U.S. Constitution. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 293 U.S. 284 (1927); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Carey v. Population Services*, 431 U.S. 678 (1977). As this Court emphatically stated in *Pierce*, 268 U.S. at 535, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high obligation, to recognize and prepare him for additional obligations."

In *Pierce*, this Court declared unconstitutional an Oregon law that compelled public school attendance and

prohibited any form of alternative education, noting that the "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children." *Id.* In *Meyer*, decided two years earlier, this Court held "unreasonable" and thus unconstitutional a Nebraska statute that prohibited the teaching of foreign languages to any child before the eighth grade.

Admittedly, some degree of uncertainty exists concerning the nature of parental liberty rights recognized in the *Meyer-Pierce* line of cases. As the First Circuit recently noted, "The *Meyer* and *Pierce* cases were decided well before the current 'right to privacy' jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those rights whose infringement merits heightened scrutiny." *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995); *Herndon v. Chapel Hill-Carrboro Cty. Bd. of Educ.*, 89 F.3d 174, 178 (4th Cir. 1996) (recognizing that this Court has not addressed Fourteenth Amendment parental liberty rights "standing alone" for decades, thus leading to some ambiguity in the law and conflicts in federal and state courts); *see also Blackwelder v. Safnauer*, 689 F. Supp. 106, 136 (N.D.N.Y. 1988) ("the degree of judicial scrutiny to be applied to a governmental action that interferes with the privacy interests recognized in *Pierce* and *Meyer* . . . is not clear to this court").

Some courts and several of the *amici* in this case latch onto the "reasonableness" language in *Meyer* and *Pierce* and argue that these cases stand for the proposition that parental rights are non-fundamental and therefore that

laws restricting such rights are subject only to rational basis review. *See, e.g., Michigan v. Bennett*, 501 N.W.2d 106 (Mich. 1993) (finding the right to direct the education of children to be a non-fundamental right); Brief of Nat'l Conf. of State Legislatures, *et al.* at 12-14. These contentions are incorrect. While *Meyer* and *Pierce* use the language of reasonableness, both were decided over a decade before this Court established its current standard of review in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (setting forth modern fundamental rights/strict scrutiny review and non-fundamental rights/rational basis review).

Rather, the cases stand for the proposition that governmental bodies "may not pursue legitimate educational ends by means whose primary effect is to override the reasonable educational choices of parents." Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937, 1006 (1996); *see also Farrington*, 273 U.S. at 298 (striking down state regulation of supplemental foreign-language schools that denied parents "reasonable choice and discretion in respect to teachers, curriculum and textbooks"). In other words, under pre-*Carolene Products* jurisprudence, the issue in the *Meyer-Pierce* line of cases was decidedly not whether the state requirements were "reasonable," but whether the requirements "*unreasonably* interfered with the *rights of parents* under the Fourteenth Amendment." See *Pierce*, 238 U.S. at 534 (emphasis added).

Petitioners and *Amici Curiae* National Conference of State Legislatures, *et al.* contend that Fourteenth Amendment parental liberty rights are only recognized as fundamental if combined with First Amendment rights and

that this Court's decision in *Pierce* was primarily about the right of parents to direct the religious upbringing of their children. See Petitioners' Brief at 25-36; Brief of Nat'l Conf. of State Legislatures' at 9-10. It is quite clear, however, that *Meyer* and *Pierce* stand for a proposition far broader than this. These cases rested exclusively on Fourteenth Amendment grounds and did not involve religious objections to state requirements. In *Pierce*, for instance, one of the two parties challenging Oregon's public school attendance requirement was a secular military academy. The Court did not in any way distinguish between the right of Oregon parents to send their children to a Catholic school, which was another party to the case, or to the secular private school in question. Rather, the Court merely stated that compelled public school attendance "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of their children." *Pierce*, 268 U.S. at 509-10.

Both petitioners and National Conference of State Legislatures, *et al.* distort passages from *Prince v. Massachusetts*, 321 U.S. 158 (1944) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) in an attempt to unduly narrow the holding of *Pierce*. The right to send one's child to a religious school is undoubtedly an important component of the right to select a private education for one's child, and it is quite understandable why this Court identified that aspect of the *Pierce* holding in *Prince* and *Yoder*, both of which involved religious objections to infringements of parental liberty. Nothing in either of these cases, however, suggests that this Court meant to retroactively restrict its *Pierce* holding to First Amendment grounds.

Indeed, guaranteeing the right of parents to select a religious school while denying parents the right to send their children to a secular private school would stand in much tension with this Court's current jurisprudence of neutrality in free exercise and establishment clause matters. *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

Although *Meyer* and *Pierce* set forth a clear presumption in favor of parental rights over state interference, it is important to examine whether parental liberty rights should be recognized as fundamental under the current standards of this Court. As the following sections make clear, Fourteenth Amendment parental liberty rights fall squarely within the recognized traditions, laws and background principles of the Constitution, thereby necessitating recognition as fundamental rights.

II. THE COMMON LAW AND OUR NATION'S HISTORY AND TRADITIONS SUPPORT RECOGNIZING PARENTAL LIBERTY AS A FUNDAMENTAL RIGHT.

The precise right at issue in this case must be clarified at the outset. The right is not, as petitioners contend, "a parent's asserted prerogative to prevent a child from visiting with his or her grandparents." *See* Petitioners' Brief at 30. Rather, the right at stake is "the interest of a parent in the companionship, care, custody, and management of his or her children," and what level of scrutiny laws that interfere with that right should receive. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Parental rights, recognized under the due process clause of the Fourteenth Amendment, are admittedly not in the text of that amendment or in the Constitution. And while the recognition of non-textual constitutional rights is a controversial area, all members of this Court agree that such rights exist. *See Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 848-49, 951-52, 981 (1992) (plurality and dissenting opinions). The essential disagreement is whether a claimed right is consistent with, or antagonistic to, the recognized traditions, laws, and background principles underlying the Constitution and our republic as a whole. *See Bowers v. Hardwick*, 478 U.S. 186, 192-95 (1985). As discussed below, the background principles of common law, our nation's traditions, and the long-standing decisions of this Court indicate that parental rights, though non-textual, must be recognized as fundamental and, moreover, are encumbered with none of the difficulties that leave others highly controversial.[2]

---

[2] We believe that the Ninth and Fourteenth Amendments to the United States Constitution reflect the natural rights orientation of the amendments' drafters and the common law traditions present at the time of their passage. *See* Corwin, *The "Higher Law" Background of American Constitutional Law* (1955); Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 Const. Commentary 93 (1995). These amendments were intended not to create new rights, but rather to protect pre-existing rights from state interference. In our view, the Privileges or Immunities Clause of the Fourteenth Amendment and the Ninth Amendment, rather than the Due Process Clause, should be the primary sources for the recognition of substantive, albeit non-textual, individual rights. *See, e.g.*, Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y (1989); Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (1989); Shankman & Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, Cato Policy Analysis No. 326 (November 23, 1998). Of course, the Privileges or Immunities Clause was largely read out of the Constitution in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1871), thus encouraging the creation of "substantive due process" rights. Whether it is too late in the day to reconsider *Slaughter-House* is a matter of great debate among legal scholars and even some members of this Court. *See* Kurland, *The Privileges or Immunities Clause "Its Hour Come Round at Last"?*, 1972 Wash. U. L. Q. 405; Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century* (1990); *Saenz v. Roe*, 119 S.Ct. 1518 (1999). We believe firmly that *Slaughter-House* should be reconsidered by the Court and that the Privileges or Immunities Clause should be restored to its rightful place as the protector of basic individual rights. Nevertheless, the right of parents to direct the upbringing and education of their children, as the following sections make clear, is deeply embedded in our Nation's history and traditions and should be recognized as fundamental under either the Due Process or the Privileges or Immunities Clauses of the Fourteenth Amendment.

One of the most widely acknowledged and well-established rights at common law and at the founding of this country was the right of parents to have primary responsibility for the upbringing and education of their children. Family law scholar Bruce C. Hafen states that "[t]he common law has long recognized parental rights as a key concept, not only for the specific purposes of domestic relations law, but as a fundamental assumption about the family as a basic social, economic, and political unit." Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. Rev. 606, 615; Locke, *An Essay*

Concerning the True Original Extent and End of Civil Government, ¶¶ 67, 69 (Great Books ed. 1991) (noting that parents may employ teachers but ultimate authority over children lies with parents).

Innumerable state cases reflect the understanding that parental rights were sacrosanct in both English and early American law. See, *e.g.*, *Rulison v. Post*, 79 Ill. 567, 573 (1875) ("Law givers in all free countries . . . have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. That is, and ever has been, the spirit of our free institutions."); *Matarese v. Matarese*, 47 R.I. 131, 132-33, 131 A.198, 199 (1925) ("Immerorially the family has been an important element of our civil society, one of the supports upon which our civilization has developed. . . . These fundamental principles are traceable to ancient customs and usages and are fixed by tradition and evidenced by decisions of the courts.") These decisions reflect the understanding that parental liberty is a natural right, which, like other such rights, predates the founding of the state.[3]

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[3] Common law parental liberty rights extended not only to the care and nurture of children, but also to their education as well. *See, e.g., In re Guardianship of Faust*, 239 Miss. 299, 305-07, 123 So. 2d 218, 220-21 (1960) ("The kind and extent of education, moral and intellectual, to be given a child and the mode of furnishing it are left largely to the discretion of parents. . . . [T]his important parental right is protected by common law principles."). Moreover, these rights were modified but not extinguished with the enactment of compulsory school attendance laws. *See, e.g.*, Moskowitz, *Parental Rights and State Education*, 50 Wash. L. Rev. 623, 636-43 (1975); Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's*

Early common law traditions and cases recognizing and enforcing the right of parents to direct their children's upbringing and education were the basis for the landmark *Meyer* and *Pierce* decisions. *See* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Societal Interests*, 81 Mich. L. Rev. 473, 572 (1983) ("when the Court in 1923 first recognized that the right of parents to direct the upbringing of their children was part of the substantive liberty protected by the due process clause, it did not create a new legal right out of whole cloth. It merely acknowledged in constitutional language the traditions . . . that predated the Constitution"); *see also* Hirschoff at 897. More recently, Justice Kennedy noted that the history of the common law, Western civilization, and American traditions signal an understanding that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Hodgson v. Minnesota*, 497 U.S. 417, 484 (Kennedy, J., concurring in part and dissenting in part) (1990) (quoting *Prince*, 321 U.S. at 166).[4]

Child Excused From Objectionable Instruction?, 50 Southern Cal. L. Rev. 871, 886-97 (1977); *School Board v. Thompson*, 103 P. 578 (Okla. 1909); *Hardwick v. Board of School Trustees*, 205 P. 49 (Cal. App. 1921).

[4] Justice Kennedy further noted in *Hodgson*, *id.* at 483, that while the common law traditionally vested primary parental authority with the father, "the common law of most States has abandoned the idea that parental rights are vested solely in fathers, with mothers being viewed merely as agents of their husbands; it is now the case that each parent has parental rights and responsibilities."

As set forth previously, the Due Process Clause of the Constitution guarantees those liberties "traditionally protected by our society" and those " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.)). In addition to being recognized at common law, parental liberty is worthy of fundamental status because it represents protection of an institution of the utmost importance to our society: the family. As this Court has stated, "the sanctity of the family . . . is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977); *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979) (Powell, J.) ("While we do not pretend any special wisdom on [childrearing], we cannot ignore that . . . deeply rooted in our Nation's history and tradition is the belief that the parental role implies a substantial measure of authority over one's children.")

Recognizing parental authority over children is not in any way contrary to the important American principle of individualism. Indeed, the central role of parents in the upbringing of children protects the family from undue governmental interference in the preparation of children to be free and responsible adults:

> No assumption more deeply underlies our society than the assumption that it is the individual [parent] who decides whether to raise a family, and, in broad measure, what values and beliefs

> to inculcate in the children who will later exercise the rights and responsibilities of citizens and heads of families. . . . The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.

Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 Boston U. L. Rev. 765, 772-73 (1973); *Hodgson*, 497 U.S. at 444-45 n.31 (Stevens, J.) ("Properly understood . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.") In sum, under our legal traditions, parents are the rightful incubators of moral values and standards and, absent some demonstration of harm to children, government may not intrude into the sanctity of the family.

III. RECENT DECISIONS BY THIS COURT UNDERSCORE THE CENTRALITY OF PARENTAL LIBERTY TO OUR NATION'S HISTORY AND TRADITIONS.

Parental liberty rights have a rich constitutional pedigree, and a firm foundation exists in the law for acknowledging such rights as fundamental. As mentioned previously, despite the lack of recent cases addressing this issue specifically, earlier decisions of this Court have established parental liberty as "essential to the orderly pursuit of happiness by free men," *Meyer*, 262 U.S. at 399, and a basic value "implicit in the concept of

ordered liberty," thus meriting recognition of fundamental status. *See Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

Moreover, this Court has consistently incorporated parental liberty rights – and *Meyer* and *Pierce* – into decisions involving fundamental privacy rights recognized under the Fourteenth Amendment. *See, e.g., Griswold*, 381 U.S. at 483 (incorporating "the principle of *Meyer* and *Pierce*"); *Ginsburg v. New York*, 390 U.S. 629, 639 (1968) (childrearing is "basic in the structure of our society"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating that family rights and childrearing are fundamental rights); *Kelly v. Johnson*, 425 U.S. 238, 244 (1976) (equating *Meyer* parental liberty rights to those rights recognized in *Roe* and *Griswold*); *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 881 (1990) (equating "right of parents . . . to direct the education of their children" with "freedom of speech and of the press"); *Casey*, 505 U.S. at 848 (1992) (most recent affirmation of parental liberty rights and *Meyer* and *Pierce*).

In *Casey*, 505 U.S. at 851, this Court held that within the sphere of protected individual liberties are "personal decisions relating to marriage, . . . , family relationships, child rearing, and education." Lower courts' cavalier dismissal of parental liberty as a non-fundamental right flies in the face of *Casey*'s pronouncement concerning the fundamental nature of parental rights as they relate to childrearing and education.[5]

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[5] Indeed, the plurality in *Casey* identified a central rationale for the doctrine of *stare decisis*: "the concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Id.*, 505 U.S. at 854. To reduce state interference with parental rights to *de minimus* "rational basis" review would not constitute an exercise in judicial restraint. Rather, it would upset a basic liberty cherished by Americans and their forebears for centuries.

Accordingly, the right of parents to direct the upbringing and education of their children should likewise be affirmed as fundamental, and violations of this right should be subject to strict scrutiny. If this Court is unwilling to apply strict scrutiny, the respect accorded by this Court and others to parental rights, the traditions of this Nation, and the background principles of common law justify at least heightened or intermediate scrutiny. As discussed *infra*, adoption of rational basis review would make laws and regulations that intrude into the family realm virtually unreviewable and entirely undermine the ability of parents to direct their children's upbringing and education.

IV. RATIONAL BASIS REVIEW WILL LEAVE PARENTAL LIBERTY VIRTUALLY UNPROTECTED AND SANCTION UNPRECEDENTED, SERIOUS INTRUSIONS BY GOVERNMENT INTO THE FAMILY REALM.

Classification of Fourteenth Amendment parental liberty rights as non-fundamental and adoption of rational basis review for parental liberty claims would allow parents little recourse when faced with intrusive laws or regulations. Under rational basis review, a law must be upheld "if there is any reasonably conceivable state of

facts that could provide a rational basis" for the law. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). In reality, such review "is tantamount to no review at all." *Id.* at 323 n.3 (Stevens, J., concurring); *see also* Nowak & Rotunda, *Constitutional Law* §§ 11.4, 14.3 (1991) (discussing extremely lax rational basis review standard). Indeed, even the extreme requirements struck down in *Meyer* and *Pierce* – prohibitions on foreign language instruction and private education – were justified on the basis of furthering such valid educational purposes as promoting good citizenship values, and most likely would have been upheld if subject to modern rational basis review.[6] *See Meyer*, 262 U.S. at 398; *Pierce*, 268 U.S. at 517.

Petitioners and their *amici* attempt to raise the specter of constant court interference with the decision of state courts and governmental bodies in the field of domestic relations law if this Court recognizes Fourteenth Amendment parental liberty rights as fundamental. In fact, the parties have it exactly backward. A finding that parental liberty is a non-fundamental right and a reversal of the court below would sanction broad and serious intrusions by governmental bodies and courts into the family realm. The invalidated Washington statute is the true example of "judicial activism," empowering judges to second guess parental judgments under the pretext of promoting the "best interests" of children. In contrast, the position of the Supreme Court of Washington provides a bright line

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[6] That fact further undermines petitioners' argument that the Court in *Meyer* and *Pierce* used rational basis scrutiny in the pre-rational basis era.

that properly balances the state's interest in protecting children with parental prerogatives: "[S]ome harm [must] threaten[ ] the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her own child. . . . '[T]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.' " *Custody of Smith*, 969 P.2d at 29, 30 (quoting *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn.1993)).

Moreover, the slippery slope argument advanced by petitioners in this regard is wildly overblown. They assert, for instance, that affirming the Supreme Court of Washington's opinion would "constitutionalize" every custody and visitation case in the country. See Petitioners' Brief at 27. This litigation, however, importantly involves a dispute between a parent and non-parents. It is clear, therefore, that only one party possesses some degree of parental rights with respect to the child in question. Custody and visitation disputes between two parents, each of whom possess parental rights, present an entirely different type of conflict. Both parties have Fourteenth Amendment parental liberty rights and stand on the same level for constitutional purposes. It is therefore the job of courts to resolve such custody and visitation disputes pursuant to the well-developed body of family law jurisprudence existing in each of the fifty states.

The approach of the Supreme Court of Washington to the instant matter is entirely consistent with the common law traditions and precedents discussed previously. Under those traditions, children are under the care and custody of their rightful parents, until such time that the parents interfere with – i.e. harm – the child's health or

safety. At that point, the state has a compelling interest to intrude into family arrangements.

In attempting to justify its approach to parental rights, petitioners also invoke *Casey* and its emphasis on the magnitude of impact of a governmental action on a constitutional right. Petitioners' Brief at 22-23. Petitioners' line of analysis, however, would undoubtedly lead this Court to provide insufficient protection to parental liberty. Under petitioners' theory, parents have some degree of freedom to control the upbringing of their children in those areas that implicate vital aspects of the parent-child relationship. This test, however, places the government in the untenable position of determining the relative importance of various aspects of childrearing. Reasonable people can disagree as to those things that most affect a child's development, and it is crucial to the protection of parental liberty that individual parents, and not the government, be allowed to assess what matters are important to the upbringing of their children and to control the decisions that are made in those realms, subject to restrictions which pass strict scrutiny.

Moreover, this Court's decision in *Casey* actually supports the Supreme Court of Washington's judgment in the instant matter. The central feature of the majority opinion in *Casey* was the "constitutional doctrine that where reasonable people disagree the government can adopt one position or the other . . . assumes a state of affairs in which the choice does not intrude on a protected liberty." *Casey*, 505 U.S. at 851. Accordingly, the government must not coerce choices within spheres of protected liberty if reasonable people could disagree with those choices. Certainly, reasonable people could disagree with whether

grandparents in this particular case or other third parties in another case should have access to children. However, these choices, as *Casey* acknowledges, take place in spheres of protected liberty, personal decisions relating to "marriage, . . . , family relationships, child rearing, and education." *See Casey*, 505 U.S. at 851; see also Gilles, 63 U. Chi. L. Rev. at 1003-04. Therefore, under *Casey*, the government may not interfere within the protected spheres of "family relationships" and "childrearing," absent some showing of harm.

In the area of childrearing and family arrangements, our Nation's history and traditions are premised on the idea that parents, not the government, will do what is in the "best interests" of their children. Parents, to be sure, may not always make the best decisions, but as the Supreme Court of Washington noted, "it is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." *Custody of Smith*, 969 P.2d at 31. A determination by this Court that parental prerogatives and choices should be set aside in the name of the "best interests" of the children or because Washington's law had a "reasonable relationship" to valid state interests will sanction unprecedented intrusions by government into the family realm. That outcome is diametrically opposed to both the decisions of this Court and our Nation's recognition of the primary role of parents in the upbringing and education of children.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the decision of the Supreme Court of Washington, and, in doing so, recognize Fourteenth Amendment parental liberty rights as fundamental.

Respectfully submitted,

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